80-233

Supreme Court, U. S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

WILLIE ELLIS JAMES WALTON

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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QUESTION PRESENTED

WHERE, AFTER DEFENDANT'S CONVICTION AT A WAIVER TRIAL OF A LESSER-INCLUDED OFFENSE AND ACQUITTAL OF A SECOND COUNT, THE APPELLATE COURT ON DEFENDANT'S APPEAL OF HIS CONVICTION, FINDS RETRIAL NECESSARY BECAUSE DEFENDANT'S WAIVER OF A JURY TRIAL, MADE PRIOR TO TRIAL, WAS STATUTORILY DEFECTIVE, HAD JEOPARDY BOTH ATTACHED AND NOT ATTACHED -- SO AS TO ALLOW RETRIAL BUT ONLY ON THE LESSER-OFFENSE, NOT ON THE ORIGINAL CHARGES, AS HELD BY THE MICHIGAN COURT OF APPEALS?

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Now comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward R. Wilson, Principal Attorney, Appeals, and Anne B. Wetherholt, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Michigan entered in the above-entitled cause on January 10, 1980, leave to appeal denied by the Michigan Supreme Court on June 10, 1980.

OPINIONS BELOW

The Michigan Court of Appeals by an opinion issued January 10, 1980 barred retrial of defendant on the originally charged offenses on double jeopardy grounds. Said opinion is appended as Appendix A. The Michigan Supreme Court denied leave to appeal this decision in an order issued June 10, 1980. This order is appended as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Michigan Court of Appeals was issued January 10, 1980. Application for leave to appeal by Petitioner was denied by the Michigan Supreme Court on June 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTION PRESENTED

WHERE, AFTER DEFENDANT'S CONVICTION AT A WAIVER TRIAL OF A LESSER-INCLUDED OFFENSE AND ACQUITTAL OF A SECOND COUNT, THE APPELLATE COURT ON DEFENDANT'S APPEAL OF HIS CONVICTION, FINDS RETRIAL NECESSARY BECAUSE DEFENDANT'S WAIVER OF A JURY TRIAL, MADE PRIOR TO TRIAL, WAS STATUTORILY DEFECTIVE, HAD JEOPARDY BOTH ATTACHED AND NOT ATTACHED - - SO AS TO ALLOW RETRIAL BUT ONLY ON THE LESSER-OFFENSE, NOT ON THE ORIGINAL CHARGES, AS HELD BY THE MICHIGAN COURT OF APPEALS?

List of Parties to the Proceeding

Willie Ellis James Walton, Respondent
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CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

In Michigan a defendant may waive his constitutional right to a jury trial[1] under MCL 763.3; MSA 28.856[2]. On the day of trial defendant signed the Waiver of Trial by Jury form, the trial judge stated in open court that defendant had signed the waiver form which was filed in the court file and defense counsel acknowledged that this was to be a waiver trial (Trial Transcript p. 3, Appendix C). In his appeal of right upon

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[1] United States Const, Am VI; Michigan Const of 1963, Art I, §20.

[2] Waiver of trial by jury; form, time

Sec. 3. In all criminal cases arising in the courts of this state whether cognizable by justices of the peace or otherwise, the defendant shall have the right to waive a determination of the facts by a jury and may, if he so elect, be tried before the court without a jury. Except in cases cognizable by a justice of the peace, such waiver and election by a defendant shall be in writing signed by the defendant and filed in such cause and made a part of the record thereof. It shall be entitled in the court and cause and in substance as follows: "I, _____, defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the court in which said cause may be pending. I fully understand that under the laws of this state I have a constitutional right to a trial by jury."

_____
Signature of defendant.

Such waiver of trial by jury must be made in open court after the said defendant has been arraigned and has had opportunity to consult with counsel.

conviction of the lesser-included offense of possession of heroin, defendant for the first time challenged his waiver of jury as being statutorily defective under MCL 763.3; MSA 28.856[3]. He[4] further contended federal double jeopardy principles prevented retrial on the original charges. On January 10, 1980, the Michigan Court of Appeals agreed with both of defendant's arguments ordering a new trial only on a charge of possession of heroin and barring retrial on the original charges. In so ruling, the Court distinguished Serfass v United States, 420 US 377, 95 S Ct 1055, 43 LEd 2d 265 (1975) and held that Burks v United States, 437 US 1, 98 S Ct 2141, 57 LEd 2d 1 (1978) precluded a second trial on the original charges where the acquittal resulted from the prosecution's failure to establish[5] its case.

The Michigan Supreme Court denied petitioner's application for leave to appeal this decision on June 10, 1980.

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[3] In Michigan only defendant has a right to a jury trial. The people have no such right.

[4] The Fifth Amendment right against double jeopardy is applicable to the states through the Fourteenth Amendment. Benton v Maryland, 395 US 784, 795-796, 89 S Ct 2056, 23 LEd 2d 707 (1969).

[5] The Court of Appeals apparently saw no distinction between a failure to convince the factfinder beyond a reasonable doubt (in weighing the credibility of the witnesses, etc.) and the failure to present sufficient evidence from which a rational factfinder could find guilt beyond a reasonable doubt. See Johnson v Virginia, ____ US ____, 99 S Ct ____, 61 LEd 2d 560 (1979). The prosecution's proofs were legally sufficient to support convictions as charged on both counts.

REASONS FOR GRANTING THE WRIT

The facts of this case present this Court with unusual but fundamental questions of the law of double jeopardy which have not been squarely addressed before by this Court and which were answered erroneously by the Michigan Court of Appeals, leave to appeal denied by the Michigan Supreme Court:

This Court has frequently stated that jeopardy attaches in a jury trial when the jury has been empaneled and sworn. Serfass v United States, supra, at 388; Downum v United States, 372 US 734, 83 S Ct 1033, 10 LEd 100 (1963); Illinois v Somerville, 410 US 458, 93 S Ct 1066, 35 LEd 2d 425 (1973). This is an integral part of the constitutional guarantee against double jeopardy, applicable to the states through the Fourteenth Amendment. Crist v Bretz, 437 US 28, 98 S Ct 2156, 57 LEd 2d 24 (1978). This Court has also stated that where a defendant has waived his right to a jury trial and the trial judge sits as factfinder, jeopardy attaches when the trial court begins to hear evidence. Serfass v United States, supra at 388; McCarthy v Zerbst, 85 F2d 640, 642 (10th Cir 1936).

What this Court needs to address in this case, where a trial was held to completion and a verdict rendered, is the converse question of when has jeopardy not in fact attached because, as stated in Serfass, supra at 393, "An accused must suffer jeopardy before he can suffer double jeopardy." This Court in Serfass noted:

> Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier "having jurisdiction to try the question of the guilt or innocence of the accused." Kepner v United States, 195 US at 133, 49 L Ed 114, 24 S Ct 797. See Price v

Georgia, 398 US at 329, 26 L Ed 2d 300, 90 S Ct 1757. Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy.
420 US 391-392

Petitioner contends that despite the fact that the trial commenced and went to completion, jeopardy never attached where, upon conviction of one lesser-included offense and acquittal on the other offense, the Court of Appeals upheld defendant's claim on appeal that his waiver of a jury trial, made prior to commencement of trial, was statutorily defective since, in the absence of a statutorily valid waiver of jury trial, the trial judge had no jurisdiction to sit as factfinder. Where defendant faced no risk of a determination of guilt, jeopardy did not attach.

Petitioner has found no double jeopardy cases dealing with whether a seemingly valid completed bench trial is void ab initio and not former jeopardy where defendant's waiver of jury, made before trial commenced, is later found on appeal to be statutorily defective. Similar situations have occurred with regard to defective jury trials, however. In Huey v State, 88 Tex Crim 377, 277 SW 186, 12 ALR 1003 (1920) defendant therein was tried for murder and convicted of manslaughter. On appeal he alleged error because the jury had not been sworn as required by law. The appellate court reversed his conviction and defendant was tried again as charged, over defendant's protestations of double jeopardy. The state court held there was no double jeopardy violation -- jeopardy had not attached because the jury had not been duly impaneled and sworn. Other cases have held no jeopardy has attached unless an entire jury is legally impaneled and sworn. It makes no difference whether the defect is discovered during trial, the trial stopped and a new trial immediately begun or whether the defect is discovered later upon appeal after the trial is

completed. State v Smith, 15 Wash App 725, 551, P 2d 765 (1976); Slaughter v State, 100 Ga 323, 28 SE 159 (1897); State v Herold, 68 Wash 654, 123 Pac 1076 (1912); McFadden v Commonwealth, 23 Pa 12, 62 Am Dec 308 (1854). See also discussion of this issue in 12 ALR 1006.

United States v Pecora, 484 F 2d 1289 (3rd Cir 1973) is also instructive on this issue. In Pecora, the government sought to appeal the dismissal of an indictment based on stipulated facts before a jury had been impaneled. Defendant therein argued that by entering into the stipulation he had "essentially waived" his right to a jury trial even though he had not complied with the federal rule governing waiver. The Circuit Court of Appeals held that there could be no waiver of a jury trial absent strict compliance with the federal rule. Accordingly, since defendant had not validly waived a jury trial and since no jury had been impaneled and sworn, the government had a right to appeal because reprosecution was not barred by the double jeopardy clause. It should be noted that in United States v Serfass, 492 F 2d 388 (3rd Cir 1974) the Court of Appeals faced virtually the same facts as in Pecora, and it decided Serfass on the same rationale as Pecora. This Court's decision in Serfass affirmed the Court of Appeals by holding the government could appeal the dismissal because no jeopardy had attached.

Petitioner believes that defendant in the case at bar clearly wanted to waive the jury and have the judge sit as factfinder. If he did not, he could have demanded his right to a jury trial any time during the waiver trial. No such demand appears anywhere in the trial record. Defendant got the waiver trial he sought and the benefits frequently resulting from such a trial -- conviction of a lesser-included offense and acquittal on the second count. His decision to challenge the validity of his waiver on appeal was only an appellate ploy to gain retrial on the lesser offense of which he was convicted, in the hopes of beating that charge also on retrial. Common sense leads petitioner to believe

that the verdicts rendered at trial were either both valid and no new trial necessary, or both were invalid and defendant returns to square one - - trial on both original charges. Logic does not permit defendant to have it both ways - - an invalid conviction, but a valid acquittal. A double standard should not be used to let defendant benefit from any defect he himself created. Since the Michigan courts have ruled the waiver was defective, both verdicts were rendered by a judge who had no power to sit as factfinder.

Analysis of the double jeopardy cases cited above confirms this analysis. Since defendant did not validly waive his right to a jury trial under MCL 763.3; MSA 28.856, he faced no risk of a determination of guilt because the trial judge had no power to sit as factfinder. Due to the defective waiver, only a duly impaneled and sworn jury had the power to sit as factfinder. That is, jeopardy could only have attached if a jury had been impaneled and sworn. That was never done (because all during trial defendant wanted to be tried by the court). Having successfully challenged the waiver on appeal, he may be reprosecuted on the original charges without violating federal constitutional principles against double jeopardy because he has suffered no former jeopardy.

CONCLUSION

It is respectfully submitted that the reasons outlined above, the decision of the Michigan Court of Appeals is in conflict with and misconceives decisions of this Court, and is in conflict with the Fifth and Fourteenth Amendments of the United States Constitution such that plenary review should be granted by the Court, and Petitioner's petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: July 10, 1980

ABW:pd

APPENDIX "A"

State of Michigan
Court of Appeals

Dated: 1/10/80

Before: T. M. Burns, P.J.,and Bronson and R.M. Maher, JJ. Per Curiam

People v Willie Ellis James Walton-Docket No. 78-1456

On October 27, 1977, the defendant, Willie Ellis James Walton, was charged in a two-count information with unlawful delivery of a controlled substance, MCL 335.341 (1)(a); MSA 18.1070 (41), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). On February 6, 1978, the defendant signed a "Waiver of Trial by Jury" form.[1] A bench trial was held on February 6-7, 1978, and defendant was found guilty of possession of a controlled substance, but not guilty of possession of a firearm during the commission of a felony, the court not being persuaded beyond a reasonable doubt that defendant was in possession of a firearm at the time of the commission of the felony. On February 17, 1978, defendant was sentenced to 20 to 48 months in Jackson prison and ordered placed into a drug rehabilitation program. The defendant appeals as of right.

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[1] The defendant signed the following waiver form:

"I, having had opportunity to consult with counsel, do hereby in open Court voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the above named Court, in which this cause is pending.

"I fully understand that I have a constitutional right to a trial by jury."

The form was also signed by defense counsel and a court clerk.

Our first issue deals with the question of whether defendant effectively waived his right to a jury trial when the facts disclosed that a written waiver of jury was present in the court file on the first day of trial and defense counsel acknowledged in open court that defendant did, in fact, waive his right to trial by jury.

MCL 763.3; MSA 28.856 provides in relevant part:

> "In all criminal cases arising in the courts of this state whether cognizable by justices of the peace or otherwise, the defendant shall have the right to waive a determination of the facts by a jury and may, if he so elect, be tried before the court without a jury. Except in cases cognizable by a justice of the peace, such waiver and election by a defendant shall be in writing signed by the defendant and filed in such cause and made a part of the record thereof.
>
> * * *
>
> "Such waiver of trial by jury must be made in open court after the said defendant has been arraigned and has had opportunity to consult with counsel." (Emphasis added)

People v Margelis, 246 Mich 459, 463; 224 NW2d 605 (1929), defined an open court as one where the judge was presiding. The legislature obviously intended that the trial judge must participate in the waiver proceedings. The waiver statute must be strictly construed because it is in derogation of the common law. People v Henry Brown, 57 Mich App 568; 226 NW2d 563 (1975), People v Polhamus, 59 Mich App 609; 230 NW2d 171 (1975).

In the instant case, the following colloquy took place between the trial judge and defense counsel just prior to the trial:

"The Court: All right. At this time I note from the file there is a waiver of trial by jury. Is that correct, counsel?
"Mr. Cato: That's correct, your Honor.
"The Court: I also note that the defendant has signed this waiver. So we will be proceeding without a jury in this matter."

Since the trial judge had to refer to the file to note the presence of the waiver form which had been signed only that morning, it is clear that he did not participate in the waiver process as required by the plain meaning of the statute.

We agree with the majority opinion in People v McKaig, 89 Mich App 746; ____ NW2d ____ (1979), that oral acknowledgement of the waiver is not required where it is apparent that the waiver was made in open court, as it was previously defined. In People v Rimmer, 59 Mich App 645; 230 NW2d 170 (1975), there was a written waiver which was signed by the defendant 3 months prior to the trial and there was no indication whether it was signed in open court. In that case, the Court indicated that an oral acknowledgement by the defendant on the record was necessary.

An oral acknowledgement by the defendant on the record is one method which ensures that the waiver occurred in open court. See the dissent by Judge T. M. Burns in People v McKaig, supra. We note that defense counsel cannot waive his client's right to a jury trial, as this is a personal right which can only be waived by the defendant. People v Degraffenreid, 19 Mich App 702, 713; 173 NW2d 317 (1969); People v Slappy, 59 Mich App 525; 230NW2d 4 (1975).

To the extent that they differ from this opinion, we disavow the conclusion reached in People v McKaig, supra and People v Braxton, ____ Mich App ____ (Docket #77-2343, rel'd August 20., 1979), and adopt the dissent by Judge T. M. Burns in both of the

above-mentioned cases. However, we decline to adopt a hard and fast rule requiring oral acknowledgement, although this seems to be the best and simplest method of ensuring compliance with the statute.

Defendant's conviction of possession of a controlled substance is reversed and the matter remanded for a new trial.

The prosecution contends that if this Court orders a retrial on the charge of possession of a controlled substance[2] that defendant may also be retried on the charge of possession of a firearm. We disagree.

The prosecution cites Serfass v United States, 420 US 377; 43 LEd 2d 265; 95 S Ct 1055 (1975) in support of its contention. However, in Serfass the trial court incorrectly dismissed an indictment against the defendant prior to trial. No proofs were ever taken in the matter. The Supreme Court in Serfass reiterated that jeopardy attaches when the defendant is put to trial before a trier of fact. The Court further stated that a verdict of acquittal bars a subsequent prosecution for the same offense. In the instant case, the prosecution and defense agree that the trial court based its acquittal of the defendant with regard to the felony-firearm charge on the fact that there was insufficient evidence to support the charge.

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[2] We remind the prosecution that retrial on Count I may only proceed as to the possession charge not the original charge of delivery of a controlled substance. See Green v United States, 335 US 184 (1957), and People v McMiller, 389 Mich 425; 208 NW2d 451 (1973).

In Burks v United States, 437 US 1; 57 LEd 2d 1; 98 S Ct 2141 (1978), the Supreme Court held that the prohibition against double jeopardy precludes a second trial when conviction in a prior trial is reversed by the reviewing court for lack of evidence. The Court also held in Burks that it makes no difference whether the reviewing or trial court determines the evidence to be insufficient. The Court stated through Chief Justice Burger, 57 LEd 2d at 9-10:

> "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow 'the State * * * to make repeated attempts to convict an individual for an alleged offense,' since 'the constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.' "

The policy clearly applies to the present case as well. The prosecution had its opportunity to supply evidence which warranted a conviction at the first proceeding but failed to do so. The prosecution on appeal earnestly argues that if the conviction is void for lack of a proper waiver, the acquittal must also be void to be logically consistent. The prosecutor fails to distinguish the policies underlying MCL 763.3; MSA 28.856, allowing for a waiver of jury trial and the constitutional prohibition against double jeopardy. The Michigan statute establishes specific requirements which must be fulfilled to effectively waive a jury trial. The statute represents a legislative judgment that defendants may not be tried and convicted except by a jury of peers unless the requirements allowing a waiver are strictly complied with. The statute clearly seeks to

safeguard the defendant's right to a jury trial. However, where the trial judge in a technically improper trial acquits the defendant, that defendant has not been prejudiced by the loss of his right to a jury trial. Consequently, the policy behind the statute, although technically violated, is not offended.

The prohibition against double jeopardy seeks to bar successive prosecutions for the same crime. This policy is clearly called into play where the defendant was acquitted, as here, in the earlier trial because the prosecution failed to establish its case. The prosecution has already had its trial on the felony-firearm statute and failed to prove the charge. Had the prosecution won a conviction, a retrial on the charge would have been proper. In this case, however, the policy against successive prosecutions precludes a retrial on the felony-firearm charge.

Considering the differing policies discussed above there is no inconsistency in retrying the defendant on the possession of a controlled substance charge and not on the felony-firearm charge. The jury waiver was ineffective so the defendant must now receive a trial by his peers on the possession charge. The prosecution did not produce sufficient evidence to convict the defendant on the felony-firearm charge in the first proceeding, and it does not get a second chance to gain a conviction.

Reversed and remanded for a new trial.

APPENDIX "B"

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 10th day of June in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable MARY S. COLEMAN, Chief Justice, Thomas Giles Kavanagh, G. Mennen Williams, Charles L. Levin, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices

People of the State of Michigan,
Plaintiff-Appellant,

v — SC: 64535
Willie Ellis James Walton, — COA: 78-1456
Defendant-Appellee — LC: 77-08200

On order of the Court, the motion by defendant-appellee to dismiss the application for leave to appeal is considered, and it is DENIED.

The application for leave to appeal is also considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 10th day of June in the year of our Lord one thousand nine hundred and eighty.

/s/ Corbin R. Davis, Deputy Clerk

Appendix "C"

Page 3 of Transcript - People v Willie Ellis James Walton

Detroit, Michigan
Monday, February 6, 1978
11:20 A.M.

THE CLERK: Case No. 77-08200, People versus Willie Ellis James Walton, charged with two counts.

One, delivery of heroin.

Two, possession of a firearm in the commission or attempt to commit a felony.

MR. LA BRET: The People are ready, your Honor.

MR. CATO: Defense is ready, your Honor.

THE COURT: All right. At this time I note from the file there is a waiver of trial by jury.

Is that correct, counsel?

MR. CATO: That's correct, your Honor.

THE COURT: I also note that the defendant has signed this waiver.

So we will be proceeding without a jury in this matter.

MR. LA BRET: The People are prepared to proceed.

THE COURT: Do the People want to make an opening statement?

MR. LA BRET: Yes, your Honor.